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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

CHRISTOPHER MILLER, Plaintiff and Appellant, v. HAWAIIAN GARDENS CASINO, et al., Defendants and Respondents.	B214224 (Los Angeles County Super. Ct. No. BC382656)

APPEAL from a judgment of the Superior Court of Los Angeles County, Gregory W. Alarcon, Judge. Affirmed.

Law Offices of John W. Dalton and John W. Dalton; Law Offices of Philip E. Kay and Philip Edward Kay; Law Offices of Jason L. Oliver and Jason L. Oliver for Plaintiff and Appellant.

Sheppard, Mullin, Richter & Hampton, Kevin M. Rivera and Tracey A. Kennedy for Defendant and Respondent Hawaiian Gardens Casino.

Michael St. Denis Professional Corporation, Donna Gin and Michael St. Denis for Defendants and Respondents Certified Network M, Inc. and Fortis, LLC.

INTRODUCTION

Plaintiff and appellant Christopher Miller sued respondents Hawaiian Gardens Casino, Certified Network M, Inc. (CNM), and Fortiss, LLC for sexual harassment, discrimination, and retaliation under the California Fair Employment and Housing Act (FEHA), based on the alleged conduct of an employee of Hawaiian Gardens Casino. The parties reached a settlement agreement under which respondents would pay appellant $100,000, reserving to the trial court the question of the amount of attorney fees and costs to be awarded appellant under FEHA. Although appellant moved for an award of attorney fees totaling $564,344.38 and costs amounting to $8,175.80, the trial court ultimately awarded appellant $55,000 in attorney fees and $4,740.85 in costs. Appellant challenges these awards as insufficient and unsupported. We hold that the trial court did not abuse its discretion in determining the amount of attorney fees and costs, and affirm its ruling.

FACTUAL AND PROCEDURAL BACKGROUND

Proceedings on Appellant's FEHA Claims

Appellant is a former employee of CNM who contends that while he was working on the premises of Hawaiian Gardens Casino, a casino employee sexually harassed him. He further contends that respondents wrongfully terminated him when he complained of the harassment.

Appellant engaged attorney Jason Oliver (Oliver), who conducted an investigation, including witness interviews, and assisted appellant with a complaint to the Department of Fair Employment and Housing (DFEH). Oliver, himself a seasoned sexual harassment attorney, enlisted experienced sexual harassment attorneys John Dalton (Dalton) and Philip Kay (Kay), each of whom had his own

practice, to assist him. After appellant obtained a right-to-sue letter from DFEH, he sued respondents under FEHA.

CNM moved to compel arbitration. Appellant conducted discovery on the issue of the validity and enforceability of the arbitration agreement appellant had entered into with CNM, and then filed an opposition to the motion to compel arbitration. The trial court ruled that the arbitration agreement was enforceable, but denied the motion to compel arbitration because of the presence of third-party defendants who were not parties to the agreement.

Other than the motion to compel arbitration, the parties filed no other significant motions. The parties engaged in discovery, but all discovery disputes were resolved through lengthy meet-and-confer sessions. Appellant deposed CNM's "person most knowledgeable," and respondents took a deposition of appellant lasting three days. No other depositions were taken.

After appellant's deposition, the parties participated in a mediation, which led to a settlement agreement. Respondents agreed to pay appellant $100,000, collectively, as well as appellant's "attorney fees and costs, pursuant to California law as determined by the Court."

The Trial Court's Award of $55,000 in Attorney Fees

Appellant initially moved for an award of attorney fees in the amount of $598,020.18, based on work performed by attorneys Oliver, Dalton, and Kay. After respondents pointed out a discrepancy in one of the billing entries, appellant lowered his request to $564,344.38. The trial court issued a tentative ruling, granting the motion for attorney fees in part. The court ruled as follows: "Plaintiff maintains that he is entitled to $598,020.18 in fees and costs using the Lodestar method. [¶] The court, in determining the reasonableness of attorneys' fees may

use the Lodestar method. . . . [¶] Based upon the court's familiarity with the case, the complexity of the issues, the contentiousness of the parties' attorneys, the amount of motions and appearances before the court, and in light of the fact that this matter did not proceed to trial but was resolved by way of a confidential settlement, the court deems $40,000.00 as a reasonable total award for attorneys' fees."

At the hearing, appellant's counsel and the court had the following colloquy about appellant's attorney fees request:

"[APPELLANT'S COUNSEL]: [F]or purposes of the record, I wanted to – it appears that the award that has been made is a [*sic*] 40 percent of the settlement amount. It's $40,000 on a $100,000 recovery. Is that an accurate assessment?

"THE COURT: I didn't do it on a percentage wise, but I think that's right.

". . .

"[APPELLANT'S COUNSEL]: For the record I also would like to inquire of the court if it determined whether there were any exceptional circumstances which justified limiting the fee of $40,000?

"THE COURT: I would be happy to hear argument on that. I thought I already put in something about that.

"[APPELLANT'S COUNSEL]: The tentative is silent as to any exceptional circumstances which would limit the fees requested for the hours of work performed to $40,000. And I just wanted to find out if there were any exceptional circumstances.

"THE COURT: I think your argument about that, there was – I agreed with the defendant about excessive billing, double billing, the strength of the case, the amount of the case, where the settlement was, billing 44 hours for one day, things

like that, which was a concern to me. I don't know how one person bills 44 hours for one day.

"[APPELLANT'S COUNSEL]: In the reply paper that was squarely addressed.

"THE COURT: I'm just saying the bills, I'm not talking – I'm not saying you didn't address it. I'm saying that is the bill, 44 hours in one day.

"[APPELLANT'S COUNSEL]: Yeah, and that was addressed in the reply papers. That was an error. It's 4.4 hours. The new total was provided in the reply brief. . . . This is an employment law case. . . . It is a particularized instance of employment law that we're seeking. . . . And the cases say absent exceptional circumstances, [] reasonable fees shall not been [*sic*] denied. So that's why I'm inquiring if there is an exceptional circumstance of the court –

"THE COURT: I didn't think they were reasonable. That was the exceptional – if that's an exceptional, I didn't think the fees were reasonable based upon the three lawyers, what, throughout the state that handled this? Based upon the amount of hours – I mean I could go on."

The court then suggested that the parties could hold a trial on the matter of attorney fees. While plaintiff requested a trial, defendants advocated for submitting the issue of attorney fees on the papers in the interest of keeping fees down. Defendants disclaimed any desire to cross-examine the witnesses who had submitted declarations in support of plaintiff's motion for attorney fees. Following further argument, the court issued a minute order stating: "The court would request each counsel to prepare a proposed ruling which breaks down all of the costs and provides [a] detailed rationale for the amounts sought . . . , at which time the matter will be taken under submission."

After each party submitted a proposed order, and appellant filed objections to respondents' proposed order, the court entered an order granting an award of attorney fees to appellant in the amount of $55,000. The court ruled that it had exercised its discretion to reduce the amount claimed by appellant because the claimed fees were "duplicative and unnecessary." The court based this finding on three specific reasons: First, it concluded that appellant "has not justified the necessity for and coordination among three experienced attorneys for this non-complex single plaintiff case that was settled during a private mediation and did not go to trial." Second, the court found that appellant's counsel "billed an inordinate amount of time given their level of experience, much of which was spent on duplicative tasks and tasks that were unnecessary and unwarranted." Finally, the court determined that appellant's counsel's billing records "lack specificity and are unreliable."

The court further ruled that a fee enhancement to the basic lodestar figure was not justified because "Plaintiff's counsel admits the contingency factor has already been factored into their hourly rates used to calculate the lodestar amount," because "[t]he results obtained, the novelty and difficulty of the case, and the quality of representation are already encompassed by counsel's hourly rates used to calculate the lodestar amount," and because the litigation did not interfere with counsel's ability to take on other work.

The court concluded that for these reasons, and "based upon the court's familiarity with the case, the complexity of the issues, the contentiousness of the parties' attorneys, the number of motions and appearances before the court, and in light of the fact that this matter did not proceed to trial, but was resolved by way of a confidential settlement in the total amount of $100,000, the court deems $55,000 as a reasonable total award for attorneys' fees."

After the court issued this order, appellant did not request a statement of decision explaining more specifically how the trial court calculated the fee award in the amount of $55,000.

The Trial Court's Award of $4,740.85 in Costs

Along with its motion for attorney fees, appellant also moved for an award of costs in the amount of $8,175.80.

The court's tentative decision on the motion was silent as to appellant's request for costs. At the hearing, appellant's counsel asked: "I notice that the order . . . of the court is silent as to the unimposed costs requested in the amount of 8175 [*sic*]. I assume that that's been granted, Your Honor." The court answered "yes."

After the court invited the parties to prepare proposed orders which broke down all the claimed costs, respondents submitted a proposed order contending that appellant had requested reimbursement for costs for mileage, parking, research, Fed Ex, fax, telephone, copying and postage, that were unallowable costs under Code of Civil Procedure section 1033.5. Appellant objected that the court had already granted appellant's costs in full, but appellant did not address whether the disputed costs were in fact recoverable under section 1033.5. The court ultimately agreed with respondents that a portion of the claimed costs were unallowable, and awarded costs totaling $4,740.85.

DISCUSSION

Standard of Review

We review the trial court's ruling on appellant's motion for attorney fees for abuse of discretion. (*Chavez v. City of Los Angeles* (2010) 47 Cal.4th 970, 989

(*Chavez*).) "An abuse of discretion is shown when the award [of attorney fees] shocks the conscience or is not supported by the evidence." (*Jones v. Union Bank of California* (2005) 127 Cal.App.4th 542, 549-550.) "The 'experienced trial judge is the best judge of the value of professional services rendered in his court, and while his judgment is of course subject to review, it will not be disturbed unless the appellate court is convinced that it is clearly wrong.' [Citations.]" (*Serrano v. Priest* (1977) 20 Cal.3d 25, 49 (*Serrano III*).) We generally presume the attorney fee award was correct "'on matters as to which the record is silent' [citation]." (*Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1140 (*Ketchum*).) Appellant bears the burden of demonstrating an abuse of discretion. (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 566 (*Denham*).)

I. *Appellant Has Not Demonstrated that the Trial Court Abused Its Discretion In Calculating the Attorney Fees Award of $55,000*

In actions seeking damages for violations of FEHA, "'the court, in its discretion, may award to the prevailing party reasonable attorney fees and costs.'" (Gov. Code, § 12965, subd. (b); *see Chavez, supra*, 47 Cal.4th at p. 984.) "[A]ttorney fee awards, which make it easier for plaintiffs of limited means to pursue meritorious claims [citation], 'are intended to provide "fair compensation to the attorneys involved in the litigation at hand and encourage [ ] litigation of claims that in the public interest merit litigation."' [Citation.]" (*Chavez, supra*, 47 Cal.4th at p. 984.) A trial court should ordinarily award a prevailing FEHA plaintiff fees "for all hours reasonably spent," (*Serrano v. Unruh* (1982) 32 Cal.3d 621, 633 (*Serrano IV*)), "unless special circumstances would render a fee award unjust. [Citations.]" (*Chavez, supra*, 47 Cal.4th at p. 976.)

Courts apply the lodestar method set forth in *Serrano III* to compute attorney fees awards to a successful FEHA plaintiff.[1] (*Chavez, supra,* 47 Cal.4th at p. 985.) "Using that method, the trial court first determines a touchstone or lodestar figure based on a careful compilation of the time spent by, and the reasonable hourly compensation for, each attorney, and the resulting dollar amount is then adjusted upward or downward by taking various relevant factors into account. [Citations.] When using the lodestar method to calculate attorney fees under the FEHA, the ultimate goal is 'to determine a "reasonable" attorney fee, and not to encourage unnecessary litigation of claims that serve no public purpose either because they have no broad public impact or because they are factually or legally weak.' [Citation.]" (*Ibid*.)

"Ultimately, the trial judge has discretion to determine 'the value of professional services rendered in his [or her] court . . . .' [Citation.] However, since determination of the lodestar figures is so '[f]undamental' to calculating the amount of the award, the exercise of that discretion must be based on the lodestar adjustment method. [Citations.]" (*Press v. Lucky Stores, Inc.* (1983) 34 Cal.3d 311, 322.) "If there is no reasonable connection between the lodestar figure and the fee ultimately awarded, the fee does not conform to the objectives established in *Serrano III*, and may not be upheld." (*Id.* at p. 324.)

Some of the relevant factors that trial courts may consider in adjusting the lodestar figure upwards or downwards include: "'(1) the novelty and difficulty of the questions involved, (2) the skill displayed in presenting them, (3) the extent to

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[1] Although *Serrano III* concerned an award of attorney fees under Code of Civil Procedure section 1021.5, the Supreme Court has specifically directed us to look to *Serrano III* and other cases interpreting section 1021.5 in deciding whether and how to award fees under section 12965, subdivision (b). (*See Chavez, supra,* 47 Cal.4th at p. 985.)

which the nature of the litigation precluded other employment by the attorneys, [and] (4) the contingent nature of the fee award.'" (*Graham v. DaimlerChrysler Corp.* (2004) 34 Cal.4th 553, 579 (*Graham*).)

In addition, "'[a] fee request that appears unreasonably inflated is a special circumstance permitting the trial court to reduce the award or deny one altogether.' [Citation.]" (*Chavez, supra*, 47 Cal.4th at p. 990.) "[T]rial courts must carefully review attorney documentation of hours expended; 'padding' in the form of inefficient or duplicative efforts is not subject to compensation. [Citation.]" (*Ketchum, supra*, 24 Cal.4th at p. 1132.) Although attorneys fee awards need not be "strictly proportionate" to the damages recovered, in calculating a fee award, the trial court may also properly consider the results obtained relative to the amount of fees sought. (*Chavez, supra*, 47 Cal.4th at p. 989; *see Harrington v. Payroll Entertainment Services, Inc.* (2008) 160 Cal.App.4th 589, 594 [fixing attorney fees amount at $500, not the requested amount of $46,277, "[g]iven the nature of the dispute, the amount of the settlement, and the record on appeal"; cited with approval in *Chavez, supra*, 47 Cal.4th at p. 990.)

Appellant contends that the trial court improperly calculated his attorney fees award by taking an arbitrary percentage of the settlement amount in lieu of employing the lodestar method, and abused its discretion in failing to apply a multiplier to the lodestar amount based on the contingent risk that appellant would not recover any damages. Neither of these contentions has merit.

A. *Appellant Has Not Demonstrated that the Trial Court Failed to Use the Lodestar Method*

Appellant maintains that counsel reasonably spent 806.2 hours litigating this "particularly hard fought case" that led to an excellent result for appellant. He

contends that his counsel is owed a total of $564,344.38, based on fees incurred both in litigating the merits of his claims as well as fees incurred on the motion for attorney fees, each subject to a multiplier for contingent risk. The $564,344.38 figure is specifically broken down as follows:

$359,335.83 – fees incurred on merits of the litigation

$179,667.92 – 1.5 multiplier on merits lodestar

$20,272.50 – "fees-on-fees" incurred

$5,068.13 – 1.25 multiplier on "fees-on-fees" lodestar

Appellant suggests that in awarding only $55,000 in attorney fees, the trial court ignored the evidence of the fees incurred by appellant's counsel. He complains that the trial court never articulated how it calculated such an award, and he maintains that instead of using appellant's counsel's billing records as a starting point to come up with a lodestar figure, the trial court must have erroneously "calculated the fee by reference to an arbitrary percentage of the $100,000 settlement sum paid to Appellant."

Contrary to appellant's suggestion, the trial court was not required to expressly acknowledge in its order that it employed the lodestar method in calculating appellant's reasonable attorney fees. (*Gorman v. Tassajara Development Corp.* (2009) 178 Cal.App.4th 44, 67 (*Gorman*).) Nor did the trial court have any sua sponte duty to make specific factual findings explaining its calculation of the fee award or the specific reductions made. (*California Common Cause v. Duffy* (1987) 200 Cal.App.3d 730, 754 (*Duffy*); *see also Gorman*, *supra*, 178 Cal.App.4th at p. 101 ["When confronted with hundreds of pages of legal bills, trial courts are not required to identify each charge they find to be reasonable or unreasonable, necessary or unnecessary"].) Appellant points to federal caselaw requiring district courts to explain their fee awards with particularity, but

California courts have explicitly departed from federal law in this regard. (*See Gorman, supra*, 178 Cal.App.4th at p. 67; *Californians for Responsible Toxics Management v. Kizer* (1989) 211 Cal.App.3d 961, 970.)

Moreover, after receiving the trial court's final order on the motion for attorney fees, appellant did not request that the trial court specify how it arrived at the $55,000 in fees. When a trial court's ruling on attorney fees does not identify the manner in which it calculated the fee award, "it is incumbent on the party who is dissatisfied with the court's calculation of the number of allowable hours to request specific findings." (*Duffy, supra*, 200 Cal.App.3d at p. 755.) "California courts have stated a disinclination to review the amount of an award when specific findings were not requested." (*Ibid*.) To the contrary, "the appellate courts will infer all findings exist to support the trial court's determination." (*Id.* at p. 754; *see Denham, supra,* 2 Cal.3d at p. 564 ["'All intendments and presumptions are indulged to support [the judgment] on matters as to which the record is silent, and error must be affirmatively shown'"]; *see also Ketchum, supra*, 24 Cal.4th at pp. 1140-1141 [even though it was impossible to tell from the record whether the trial court had employed the lodestar adjustment method, appellant's claim that attorney fees award was wrongly calculated must be resolved against him, because appellant had failed to request and furnish an adequate record of the trial court's reasoning].)

Appellant fails to persuasively distinguish *Ketchum* and *Duffy* and has not identified any basis for us to find that the trial court abused its discretion in calculating the fee award despite appellant's failure to request that the trial court explain how it did so. While appellant correctly contends that he had no "right" to a statement of decision on an attorney fees motion, it does not follow that he can complain on appeal about the court's lack of specificity regarding the fee award

calculation when he never asked for such an explanation below. The trial courts in *Ketchum* and *Duffy* similarly had no ironclad duty to issue a statement of decision on the attorney fees motions before them, and yet the Supreme Court and Court of Appeal, respectively, determined that the appellants' failure to request a statement of decision required the question of whether the trial courts abused their discretion to be resolved against the appellants. (*Ketchum*, *supra*, 24 Cal.4th at pp. 1140-1141; *Duffy, supra*, 200 Cal.App.3d at pp. 754-755.)

Appellant argues that *Martino v. Denevi* (1986) 182 Cal.App.3d 553 (*Martino*) supports his contention that where the trial court did not specify with particularity how it calculated an attorney fees award, it must be remanded. *Martino* does not stand for this broad proposition. In that case, the trial court had awarded defendant's counsel $40,000 in fees, even though "[t]he only evidence presented in support of the motion for attorney fees was the attorney's request for a flat fee for 'services rendered.' No documents, such as billing or time records, were submitted to the court, nor was an attempt made to explain, in more than general terms, the extent of services rendered to the client. At oral argument, defendant's attorney admitted he determined the fee to be paid by his clients based on a general 'feeling' about the case and the amount of work done on the client's behalf, and not by referring to detailed time or billing records." (*Id.* at pp. 559-560.) The appellate court found that this evidence plainly was insufficient to support the award of $40,000 in attorney fees. While the court further noted that the trial court did not prepare a statement of its reasons for awarding that amount, hindering the appellate court's review, it was the total absence of evidence to support the award that led the appellate court to remand for a rehearing of the attorney fees issue. (*Id.* at p. 560.)

From the record before us, it would be improper for us to conclude that the trial court arrived at the $55,000 attorney fees award by taking an arbitrary percentage of the settlement in lieu of employing the lodestar method. To the contrary, there is more than a sufficient basis for us to infer that the trial court used the lodestar approach. The trial court's tentative order states: "The court, in determining the reasonableness of attorneys' fees may use the Lodestar method. Courts generally apply a lodestar approach." The order then goes on to state factors considered by the court in tentatively reducing the award to $40,000. At the oral argument on the motion for attorney fees, the court specifically stated that it had *not* arrived at the tentative award of $40,000 by taking 40 percent of the settlement amount. The final order reflects in part the court's finding that appellant's counsel's claimed fees were "duplicative and unnecessary," supporting the conclusion that the trial court did in fact use appellate counsel's billing records as a starting point from which to depart downwards. (*See Christian Research Institute v. Alnor* (2008) 165 Cal.App.4th 1315, 1324 [rejecting contention that trial court failed to use lodestar method, and finding that "the record amply demonstrates the trial court's familiarity with [defendant's] billing submissions," including trial court's finding that "'much of the work done by the different lawyers was duplicative and unnecessary'"].) The final order further notes the trial court's conclusion that a fee enhancement to the "basic lodestar figure" was not warranted. Given these affirmative statements by the trial court, and in the absence of evidence demonstrating that the trial court in fact failed to utilize the lodestar method, we cannot find that the trial court abused its discretion in this respect.

By contrast, the inference that the trial court properly employed the lodestar figure could *not* be drawn in *Horsford v. Board of Trustees of California State University* (2005) 132 Cal.App.4th 359 (*Horsford*), relied on by appellant to

suggest that we remand the attorney fees award for reconsideration. In ruling on the FEHA attorney fees request, the trial court in *Horsford* stated that it had disregarded the time records submitted by counsel because it found them unreliable, and stated that it had arrived at the attorney fees award "'in another way.'" (*Id.* at p. 396.) The appellate court thus found that the trial court had abused its discretion in "failing to use counsels' time records as the starting point" for the lodestar figure. (*Id.* at p. 397.) We have no basis for concluding that the trial court in the instant case similarly chose to ignore appellant's counsel's billing records in calculating the fee award.

We further find that the trial court did not abuse its discretion in reducing the amount of fees claimed by appellant based on its conclusion that the fees were "duplicative and unnecessary." Appellant's counsel is only entitled to recover fees for hours that were "reasonably spent." (*Serrano IV, supra*, 32 Cal.3d at p. 635.) In reducing appellant's claimed fees from $359,335.83 (without the multiplier) to $55,000, the trial court specifically found that appellant "has not justified the necessity for and coordination among three experienced attorneys for this non-complex single plaintiff case that was settled during a private mediation and did not go to trial," that counsel "billed an inordinate amount of time given their level of experience, much of which was spent on duplicative tasks and tasks that were unnecessary and unwarranted," and that counsel's billing records "lack specificity and are unreliable."

The trial court properly relied on *California Common Cause v. Duffy* in reducing the claimed fees on the ground that they were duplicative and unnecessary. In that case, the appellants contended that the trial court had abused its discretion when it reduced by more than 50 percent the number of attorney hours that would be part of the attorney fee award. (*Duffy, supra*, 200 Cal.App.3d

at p. 752.) As here, the appellants in *Duffy* had requested attorney fees for the work by three attorneys, supporting the claim with detailed declarations. The trial court justified the reduction in fees based on the duplication of effort attributable to the fact that three attorneys were working on the case. In addition, the trial court reduced the award because "some of the [claimed] hours were devoted in unnecessarily adversarial skirmishing between the attorneys." (*Id.* at p. 754.) Finally, the court eliminated attorneys' time devoted to media relations. The appellate court held that "[t]hese reasons cited by the court were proper reasons for reducing a statutory fee award." (*Id.* at p. 754.) As in *Duffy*, we will not overturn the trial court's exercise of discretion to reduce appellant's claimed attorney fees as duplicative and unnecessary. (*See also Chavez, supra*, 47 Cal.4th at p. 990 [an "unreasonably inflated" claim for attorney fees is a "special circumstance" permitting the trial court to reduce the fees]; *Ketchum, supra*, 24 Cal.4th at p. 1132 ["'padding' in the form of inefficient or duplicative efforts is not subject to compensation. [Citation.]"].)

The trial court also did not abuse its discretion in reducing the fee award based on its observation that this case was a non-complex, single plaintiff case that settled before trial for $100,000. Trial courts may reasonably conclude that attorney fees requests are inflated in light of "the amount of time an attorney might reasonably expect to spend" in litigating a particular claim and in light of the results obtained. (*Chavez, supra*, 47 Cal.4th at p. 991; *see Gorman, supra*, 178 Cal.App.4th at p. 101 [recognizing that "[a] reduced award [of attorney fees] might be fully justified by a general observation that an attorney overlitigated a case"]; *Harrington v. Payroll Entertainment Services, supra*, 160 Cal.App.4th at p. 594 [fixing attorney fees amount at $500, not the requested amount of $46,277,

"[g]iven the nature of the dispute, the amount of the settlement, and the record on appeal"].)

Appellant contends that *Harman v. City and County of San Francisco* (2007) 158 Cal.App.4th 407 (*Harman*) supports his argument that the trial court abused its discretion in reducing the claimed attorney fees in part because the case settled for $100,000 instead of going to trial. In *Harman*, after a very protracted employment discrimination suit under 42 United States Code section 1988 had already been appealed once after trial, the trial court awarded attorney fees totaling over $1.1 million, when compensatory damages had amounted to only $30,300. (*Id.* at pp. 413, 415.) The *Harman* decision, however, only serves to emphasize the broad discretion afforded to trial courts in awarding attorney fees. While the appellate court found that the trial court had not exceeded its discretion in awarding attorney fees that greatly exceeded the damages award, it also recognized that another trial court could have exercised its discretion far differently, noting that "'California law allows the trial court to reduce . . . attorneys' fees award based on the results . . . obtained, or not to reduce the fee award, as the trial judge finds is appropriate in the exercise of . . . discretion.' [Citation.]" (*Id.* at p. 426.) Appellant has failed to demonstrate that the trial court abused its discretion in finding that a reduction of appellant's claimed fees was warranted given the court's own observations and the evidence before it about the limited nature of the litigation and the results obtained.

Appellant's final complaint about the attorney fees award is that the final order is "silent" about appellant's request for an award for the "fees-on-fees" work performed by appellant's counsel to recover its attorney fees. Appellant is correct that successful FEHA plaintiffs may recover fees for hours reasonably spent to establish and defend their fee claim. (*Serrano IV*, *supra*, 32 Cal.3d at p. 639.) However, appellant has failed to provide any affirmative evidence that the trial

court did not consider and include in its final award appellant's fees-on-fees work. Because we must infer that the trial court properly exercised its discretion in the absence of some affirmative showing to the contrary, *see Denham, supra*, 2 Cal.3d at page 564, we have no basis for concluding that the trial court abused its discretion in calculating the fees for counsel's work on the motion for fees. Having failed to request the trial court's specific calculations on the fees-on-fees request, appellant's counsel "may not . . . complain on appeal that they do not know which particular hours the court eliminated." (*Duffy, supra*, 200 Cal.App.3d at p. 755.)

B. *The Trial Court Did Not Abuse Its Discretion in Failing to Apply An Upward Multiplier Based on Contingent Risk*

Appellant also argues that the trial court's fee award failed to properly take into account the contingent risk undertaken by appellant's counsel. The trial court concluded that no enhancement of the fees was appropriate, because counsel's hourly rates used to calculate the basic lodestar figure already factored in the results obtained, the novelty and difficulty of the case, the quality of the litigation, and the contingency factor. The trial court specifically found that "Plaintiff's counsel admits that the contingency factor has already been factored into their hourly rates used to calculate the lodestar amount." Appellant contends that this was an erroneous determination by the trial court that amounts to an abuse of discretion.

Trial courts have discretion to apply a fee enhancement in the case of a contingent fee arrangement, the rationale being that a contingent fee contract "'involves a gamble on the result [and thus] may properly provide for a larger compensation than would otherwise be reasonable.'" (*Ketchum, supra*, 24 Cal.4th

at p. 1132.) "'The contingent fee compensates the lawyer not only for the legal services he renders but for the loan of those services. The implicit interest rate on such a loan is higher because the risk of default (the loss of the case, which cancels the debt of the client to the lawyer) is much higher than that of conventional loans.' [Citation.]" (*Id*. at pp. 1132-1133.) The availability of an upward multiplier in the case of a contingency arrangement encourages attorneys to take important cases enforcing important constitutional and personal rights. (*See id.* at p. 1133.)

"[T]he trial court is not *required* to include a fee enhancement to the basic lodestar figure for contingent risk . . . ; moreover, the party seeking a fee enhancement bears the burden of proof. In each case, the trial court should consider . . . the degree to which the relevant market compensates for contingency risk, extraordinary skill, or other factors under *Serrano III*. We emphasize that when determining the appropriate enhancement, a trial court should not consider these factors to the extent they are already encompassed within the lodestar." (*Id.* at p. 1138.) As with other calculations associated with attorney fees awards, the trial court is not required to explain how it calculated the contingent risk factor. (*Graham, supra*, 34 Cal.4th at p. 584.)

Appellant contends that the trial court erroneously concluded that he had admitted that the contingency factor was already factored into his counsel's hourly rates. He argues that the trial court confused the "contingent risk" factor with the "delay in payment" factor, which he contends permits trial courts to essentially award a small amount of interest on the fee award to compensate for the delay in payment throughout the proceedings. Even if appellant were correct, we do not believe that the trial court abused its discretion here in generally concluding that the lodestar figure already encompassed the contingency factor. Trial courts are never required to apply a multiplier for contingent risk; they merely have

discretion to do so. (*Ketchum, supra,* 24 Cal.4th at p. 1138.) And as discussed above, *Ketchum* specifically cautions trial courts not to apply a fee enhancement for factors that are accounted for in the basic lodestar calculation. Particularly given the trial court's conclusion that appellant's lodestar figure was already excessive, we are not persuaded that we should remand this case for reconsideration of the contingent risk multiplier. (*See Christian Research Institute v. Alnor, supra,* 165 Cal.App.4th at p. 1329 ["the trial court need not consider a multiplier when presented with an inflated, unreasonable fee request"].)

II. *The Trial Court Did Not Abuse Its Discretion in Reducing the Award of Costs*

Appellant also contends that the trial court committed reversible error because it initially indicated at the hearing that appellant's request for costs in the amount of $8,175.80 was granted in full, but then reduced the award of costs to $4,740.85 in its final order, without affording appellant notice or an opportunity to be heard.

The right to recover litigation costs is determined entirely by statute. (*Davis v. KGO-T.V., Inc.* (1998) 17 Cal.4th 436, 439.) Except for expert witness costs, the allowable litigation costs for a successful FEHA plaintiff are set forth in Code of Civil Procedure section 1033.5. (*See Anthony v. City of Los Angeles* (2008) 166 Cal.App.4th 1011, 1014.) Section 1033.5 enumerates both allowable and unallowable costs, and in addition gives the trial court discretion to allow or grant any cost items that are not specifically enumerated in that section. (Code Civ. Proc., § 1033.5, subds. (a), (b), (c)(4); *see Davis, supra,* 17 Cal.4th at p. 445.)

Notably, appellant does not dispute that section 1033.5 governs in a FEHA matter, or that appellant's claimed costs for investigation expenses, as well as Fed Ex, postage, fax, telephone, and copying charges, simply are not recoverable

expenses under section 1033.5. Section 1033.5 specifically provides that a prevailing party may *not* recover either "[i]nvestigation expenses in preparing the case for trial" or "[p]ostage, telephone, and photocopying charges, except for exhibits." (Code Civ. Proc., § 1033.5, subd. (b)(2), (3).) In addition, appellant does not dispute that the trial court had discretion to disallow costs for research of the superior court on-line docket, given that this cost is not one of those enumerated in section 1033.5. (Code Civ. Proc., § 1033.5, subd. (c)(4).)

Even though the trial court indicated orally at the hearing that appellant's motion for costs was granted in full, at the hearing's conclusion the court issued a minute order asking the parties to each submit proposed orders providing the rationale for allowing or disallowing each cost item. After respondents submitted a proposed order disputing appellant's entitlement to recover some of his claimed costs, appellant had the opportunity to try to dispute these points in the objections he filed. Having failed to do so, and having failed to advance any arguments on appeal that the trial court's ruling was erroneous, appellant has not convinced us that the trial court's reduction of the cost award constituted an abuse of discretion.

DISPOSITION

The judgment is affirmed. Respondents shall recover their costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

WILLHITE, J.

We concur:

EPSTEIN, P. J.

SUZUKAWA, J.